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STATE FOR EEB/TPP/IPE:TIMOTHY R MCGOWAN

STATE PLEASE PASS TO USTR FOR JENNIFER CHOE GROVES

SENSITIVE

SIPDIS

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SUBJECT: SPECIAL 301 FOR SWEDEN: POST RECOMMENDATION

REF: A) STATE 8410; B) 08 STATE 45106

11. (SBU) Summary. Embassy Stockholm recommends that Sweden continues to be placed in the Special 301 Initiative, and not be on the Watch List for 2009. We are aware of the differing recommendations of the International Intellectual Property Alliance (IIPA) and PhRMA. Post recommendation is based on:

-- The progress made by the Government of Sweden (GOS) in five out of the six items identified in the Special 301 Initiative Action plan we communicated to the GOS last year; and

-- The sensitive domestic politics that the GOS needs to manage in order to step up internet piracy enforcement in Sweden. The GOS struggles, with good intentions, against a very negative media climate and against a vocal youth movement. For example, we want to highlight the risk that negative media attention on the file sharing issue gives the Pirate Party a boost in the EU Parliamentary elections in June 2009.

12. (SBU) This cable reviews the progress Sweden has made on the Special 301 Initiative Action plan which we presented to the GOS at the conclusion of the Special 301 review 2008 (Ref B). Post continues to engage very constructively with the GOS, and has good access and a good working relationship with key senior and working level GOS officials. The actions taken since last year's review strengthen the legislative framework and provide better enforcement tools for combating piracy. The Pirate Bay trial is currently being heard in the district court in Stockholm. The last day of the trial is March 4, and the verdict can be expected on or about March 25.

13. (SBU) Embassy Stockholm believes it would be counter-productive to watch list Sweden at this point. Likely negative political and media reaction to a watch listing must be taken into account. The Justice Ministry, with primary responsibility for this issue, is fully on board and well aware of what is at stake. It is currently battling with the Ministry of Enterprise, Energy, and Communication about the next appropriate steps to curb internet piracy. Now that the Enforcement Directive implementation will finally enter into force on April 1, and there will soon be a first District court decision in the Pirate Bay case -- the Justice Ministry will turn its attention to other key issues, primarily the ISP liability issue and extra resources to investigative capabilities. The GOS (led by the Justice Ministry) has to conduct a delicate balancing act, advancing this issue shortly before Sweden assumes the Presidency of the EU, in the early days of the Obama administration, and in the budding election campaign for the EU Parliamentary elections.

End summary.

Background

14. (U) The International Intellectual Property Alliance (IIPA) has,

in its yearly Special 301 submission to USTR, identified widespread internet piracy and difficulties in achieving effective enforcement against criminal copyright infringement as problems in Sweden, and has requested that Sweden be placed on the Special 301 Watch List for 2009. Sweden was not placed on the Watch list in 2008, despite industry's demands, but was rather placed in the relatively recent, middle step, named Special 301 Initiative. As part of the Initiative, post conveyed a Special 301 Action plan to the GOS, covering six items where the USG hoped to see progress during 2008.

Review of progress on action plan

15. (U) The Special 301 Initiative Action plan 2008 contained recommendations in six specific areas. The GOS has acted, in various degrees, in five of those areas. A review of progress in the six areas follows in paras 6-11:

16. (SBU) Industry consultations/ISP liability: The GOS held a series of industry consultations in the summer/fall of 2008, with the explicit aim to discuss a voluntary industry agreement involving ISPs and right-holders organizations. Industry contacts reported that the ISP's were not willing (they claim they are not able) to take on any action on a voluntary basis. The first round of consultations was concluded without results during the fall of 2008. The Justice Ministry is currently working internally in the GOS to get acceptance for a second round with a clear incentive for progress, i.e. threatening with legislation in the absence of a voluntary agreement. There is some resistance in the Center party led Ministry of Enterprise, Energy, and Communications, and negotiations are on-going at senior GOS-levels.

17. (U) Injunctive relief: The one item without any progress is

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Action plan item 2, Injunctive relief. The GOS maintains that there are adequate provisions currently on the books in Sweden, and does not intend to introduce new legislation. (Note that industry claims to the contrary were supported by the recommendations of the Renfors Commission, a government study commissioned to look into the file sharing issue. The GOS has declared that it will not further implement Renfors' recommendations. End note.)

18. (U) Implementation of the Enforcement Directive: The bill was approved by Parliament on February 25, and the new provisions will enter into force on April 1, 2009. The political sensitivities made the final handling of the Bill very delicate for the Alliance government. Much of the debate and negotiations have been done in public, and there has been tremendous pressure put on individual MPs. The passage of the implementing legislation is therefore a much greater victory for the GOS than it might appear. Major changes, compared to the original proposal, are:

-- the law will not be retroactive, i.e. only for copyright infringements committed after the law has entered into force can a court order that the identity behind an IP-number be handed out.

-- The court will make a proportionality assessment, i. e. weigh the need of the rights-holder to get access to the personal identity against integrity aspects of the person behind the IP number. The law now stipulates that a certain scale of infringement will be needed for the court to decide that the information should be handed out. Normally, that would be the case when the infringement consists of up-loading a single film or musical piece -- since that typically incurs significant damage to the rights-holder. The same judgment will be made for a significant scale of down-loading copyright protected material. The law establishes that if the infringement is the down-loading of only a "few pieces", then normally the court's assessment should be that the integrity interest must take precedence and the information must not be handed out.

-- The law includes provisions that the GOS intends to observe and assess how the law is used, to ensure that the law is indeed used to go after significant cases of copyright infringements. This monitoring will commence immediately once the law has entered into

force.

¶9. (U) Granting police and prosecutors the right to identities behind IP numbers of individuals potentially implicated in copyright crimes of lower dignity, i.e. fines rather than prison sentences: The Justice Ministry has also worked towards the goal of changing legislation so that police and prosecutors can get access to information about identities behind IP numbers in cases where the crime could lead to a fine (rather than a prison sentence). The usual Swedish term for this type of crime (punishable by fine, not prison) is "crime of lower dignity." At present, law enforcement officials are only allowed to get such information if the infringement could lead to a prison sentence. The GOS has agreed to change the legislation, and it was made part of a study commissioned to propose the steps needed to implement such a change. The proposed changes were recently separated out from the rest of the study, and were reported in advance to Justice Minister Ask late January 2009. Although the slow legislative process is disappointing, the GOS has already agreed on the necessary changes that will strengthen the investigative tools of enforcement officials.

¶10. (SBU) Police and prosecutors: There are now two full-time prosecutors dedicated to IPR/copyright issues. Police officers have been trained, but we understand that they are not allowed to devote attention to IPR/copyright issues. They are back in their regular line of duty in their districts, where there are conflicting priorities. We have understood that the prosecutors have alerted that this is a problem for their work - they are "stuck" with a backlog of old errands and without the support of investigative officers. The prosecutors ask for investigative officers that are exclusively devoted to IPR issues, today there are no such investigative capacities. The Justice Ministry has repeatedly asked the Head of the Swedish Police for information about how he plans to come to terms with the investigation deficiencies. Although the GOS recognizes the needs, the budget bill for next year will likely not contain significant increases for law enforcement, given the harsh economic conditions. This is an area where post can work with the GOS and industry to highlight the significant impact additional resources in this area might have.

¶11. (SBU) Public education: In the fall of 2008, the GOS released a new information material, primarily aimed for youth, which will be broadly distributed in Swedish schools. Justice Minister Ask's staffers are currently considering the pros and cons of engaging Cabinet members in the public debate. Given all the negative

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attention around the Enforcement directive and the Pirate Bay trial, the determination thus far has been to keep a low profile. The GOS recognizes that there is a real risk that the window of opportunity was lost already several years ago -- when leading officials didn't take the debate. How to engage at this point is a delicate matter.

Pirate Bay

¶12. (U) After the raid on Pirate Bay on May 31, 2006, the issue of internet piracy was fiercely debated in Sweden. Press coverage was largely, and still is, unfavorable to the positions taken by rights-holders and the USG. The Pirate Bay raid was portrayed as the GOS caving to USG pressure. The delicate situation made it difficult, if not counter-productive, for the Embassy to play a public role on IPR issues. Behind the scenes, the Embassy has worked well with all stakeholders. After 18 months of investigation, the prosecutor filed indictments against four individuals for contribution to copyright infringement because of their activities administrating the Pirate Bay bit torrent webpage. The case is currently being heard in the district court in Stockholm, and the trial is scheduled to be completed on March 4. The sentence is expected on or about March 25, i.e. before the conclusion of the Special 301 review process. However, we fully expect that any outcome will be appealed to a higher court, which means that the final verdict will not be known for several years.

¶13. (U) PhRMA has also requested that Sweden be put on the Special 301 Watch List. The request is based on the GOS decision to de-regulate the pharmacy market in Sweden and the alleged plans to reduce prices of patented pharmaceuticals on the Swedish market with the aim to finance the redesign. The price cut is believed to be as high as 10 percent.

¶14. (U) According to the Swedish Ministry of Health and Social Affairs, the GOS does not plan to impose a general price cut on patented pharmaceuticals, but rather has the intention of maintaining a model for a value based pricing system. TLV, the Dental and Pharmaceutical Benefits Agency, a central government agency, has been assigned to suggest principles for pharmacy mark-up and to suggest how the profitability in the pharmacy market will be assessed and followed up. TLV will present its proposals to the GOS on April 1 this year.

¶15. (U) As of March 2 there is no decision, nor anything in writing, that confirms that the GOS is actually proposing a 10 percent general price cut on patented pharmaceuticals. Therefore the Embassy does not recommend that Sweden be put on the 2009 Special 301 Watch List as concerns the de-regulation of the Swedish pharmacies. However, should the GOS as a result of the April 1 TLV report reach a decision to impose a general 10 percent price cut on patented pharmaceuticals, the Embassy will engage in high-level advocacy with the GOS on the issue again.

SILVERMAN